FOR ARGUMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-156

UNITED STATES OF AMERICA, Petitioner,

- vs -

HUGH J. ADDONIZIO, Respondent

UNITED STATES OF AMERICA, Petitioner,

- vs -

THOMAS J. WHELAN and
THOMAS M. FLAHERTY, Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE LEWISBURG PRISON PROJECT

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Lewisburg Prison Project

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Interest of Amicus Curiae

The Lewisburg Prison Project, Inc. is a not for profit corporation which seeks to provide a variety of services to indigent state and federal prisoners in the Lewisburg, Pennsylvania area. One of the Project's most important interests is in parole. The Project regularly provides trained, lay volunteers to serve as parole representatives for indigent federal prisoners, and through its cooperating attorneys has assisted prisoners in individual habeas corpus cases challenging parole denials.

The Project's principal effort in parole litigation is its sponsorship of Geraghty v. United States Parole Commission, No. 76-1467 (M.D. Pa.), on remand from 579 F.2d 238 (3d Cir. 1978), petition for certiorari pending No. 78-572. Geraghty presents the questions of whether the "guidelines for decisionmaking" of the United States Parole Commission are contrary to the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233, 90 Stat. 219-31 (1976) (the "PCRA"), or, if consistent with the Act, are of ex post facto effect as applied to persons sentenced for offenses committed prior to the Act's effective date.

One of the questions at issue in Geraghty is whether the policies first adopted by the United States Board of Parole in 1973, and maintained by the United States Parole Commission subsequent to the enactment of the PCRA, marked a change in parole release decisionmaking which enhanced the effective severity of pre-1973 sentences. The government in the instant case argues to the contrary. (Pet.Br. 27-31, 50-61.) While resolution of this issue may not be necessary for a decision in the present case, we believe that our views, as developed in Geraghty, will be of use to the Court if resolution of that issue is required.

We have communicated with the parties in this cause, and believe that their consents to the filing of this brief will be forthcoming.

Summary of Argument

The petition for writ of certiorari in this case presents the sole question of whether 28 U.S.C. §2255 vests a district court with jurisdiction to correct a sentence to compensate for a revolutionary change in parole policies, unforseen at the time of sentencing, which have the effect of drastically increasing the effective severity of the sentence actually imposed. A different question, however, is addressed by the government in its brief on the merits, which focuses on the change in parole policies, and asserts that there was not a radical revision in those policies justifying collateral relief. Under Rule 23(c) of this Court, these issues should not be addressed in this case, especially when those issues do not appear to have been raised by the government in the Court of Appeals. In our view, the change in focus of the government's case suggests that certiorari may have been improvidently granted.

The narrow question presented in the petition for writ of certiorari was properly answered by the Court of Appeals. Relief is available under 28 U.S.C. §2255 on grounds which could formerly have been advanced on a petition for a writ of coram nobis, and the radical revision in parole policy which occurred after imposition of sentence constitutes a crucial error in fact justifying coram nobis relief.

If the Court chooses to consider the claim that the change in parole policy adopted in 1973 was not a radical revision in policy, this claim must be rejected. The federal parole statute was virtually unchanged from 1910 to 1973, and was firmly rooted in the prison reform movement of the late nineteenth century, and the view that incarceration was primarily for rehabilitation. The static parole criteria gave rise to the assumption on the part of sentencing judges that prisoners, with good institutional behavior, would ordinarily be paroled after having served one third of the sentence imposed. Over the years, the practice developed that a judge who believes that an offender should serve, for example, four years in prison, would customarily impose a sentence in the vicinity of ten years, relying on the availability of parole to mitigate the harsh sentence.

In 1973, however, the Board of Parole adopted explicit parole criteria, which made the parole release decision independent of the actual sentence imposed. These criteria did not codify existing policy, but instead

created new policy, based on the Board's release policy in Youth Correction Act cases. Under this policy, parole was transformed from a device to help individuals reintegrate into society as soon as they are able into a deferred sentencing procedure, and the most significant factor in the parole release decision became a redetermination by the parole borad of the severity of a prisoner's offense.

This case does not present the questions of whether this change in policy was lawful, or whether it was ratified by Congress in the 1976 amendment to the parole statute. At most, the only question in this case which is relevant to the policy adopted in 1973 is whether the new emphasis upon offense severity, and the possibility that parole would be denied merely because the prisoner had committed a serious offense, constituted a crucial error in fact justifying coram nobis relief under 28 U.S.C. §2255. This question was correctly answered by the Court of Appeals, and its decision should be affirmed.

ARGUMENT

I. CERTIORARI MAY HAVE BEEN IMPROVIDENTLY GRANTED

In its brief on the merits, the government vigorously argues that the decisions of the Parole Commission were consistent with the intent of the sentencing court,

(Pet.Br. 46-50), and that the question which should be answered by the Court is whether a sentencing judge may reduce a sentence "because he is surprised to learn that the [Parole] Commission does not yet find the defendant suitable for release on parole." (footnote omitted) (Pet.-Br. 50.) This, however, was not the basis for the decision of the Court of Appeals in this case. Nor was this question fairly presented in the petition for writ of certiorari.

In its decision in this case, the Court of Appeals applied the rule it had adopted in United States v. Salerno, 538 F.2d 1005 (3d Cir. 1976), "that resentencing is required in a [28 U.S.C.] §2255 proceeding where implementation of the Parole Commission's guidelines frustrated the sentencing judge's probable expectations in the imposition of sentence. . ." Addonizio v. United States. 573 F.2d 147, 150 (3d Cir. 1978). (Pet.App. 3a.) The limited scope of this rule had been made clear in the opinion of the Third Circuit upon denial of rehearing in Salerno:

> Our holding is narrow and does not vest sentencing courts, as alleged by petitioner, "with power of a super parole board." Our decision does, however, "permit the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the Parole Board . . . subsequent to the imposition of that sentence." (citation omitted) 542 F.2d 628, 629.

This rule was faithfully applied by the Third Circuit in this case, which affirmed the district court's decision to correct the sentencing error it had made in respondent Addonizio's case, 573 F.2d at 155 (Pet.App. 18a); the refusal of the district court to resentence respondents Whelan and Flaherty was vacated and the case remanded for reconsideration of their motion under the appropriate and narrow standards. Id. at 156. (Pet.App. 19a-20a.)

The narrow rule articulated by the Third Circuit in Salerno, and applied by that Court in this case, is not addressed by the government. (Pet.Br. 47 n. 38.) Instead, the thrust of the government's argument is that the import of a judge's sentence has not been changed by the parole guidelines (Pet.Br. 50-61), and that the parole policies applied to respondents are consistent with those authorized by Congress. (Pet.Br. 24-44.) While we believe that the government is in error in each of these contentions, see part III infra, in our view those issues are not properly before the Court.

A single question is presented in the Petition for Writ of Certiorari:

> Whether a district court may revise a lawful sentence on collateral attack when decisions of the Parole Commission "frustrated the sentencing intent" of the court. (Pet. for Writ of Cert. 2)..

As posed, this question assumes that "decisions of the Parole Commission 'frustrated the sentencing intent' of the [sentencing] court," precisely the issue which is now seriously contested by the government.

In prior cases, the Court has scrupulously applied its Rule 23(c) to limit review to "questions set forth in the petition or fairly comprised therein."[1] The arguments advanced by the government in its brief on the merits far exceed the narrow jurisdictional question set forth in the petition for writ of certiorari. Nor is the legality of the parole guidelines (Pet.Br. 24-44), a question which is "fairly comprised" within the single question presented in the petition.

Even if the issues raised by the government in its brief are viewed as "fairly comprised" within the single question presented in the petition for writ of certiorari, this case provides a poor vehicle for the Court to evaluate the nature of the revolutionary change in parole policy resulting from adoption of the parole guidelines in 1973. In the Court of Appeals, the focus of the case was

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1. See, e.g., Lawn v. United States, 355 U.S. 339, 362 (1958); Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 ,324-25 (1972); F. D. Rich v. Industrial Lumber Co., 407 U.S. 116, 121 n. 6 (1974); Milliken v. Bradley, 418 U.S. 717, 738 n. 18 (1974); Radzanower v. Touche Ross & Co., 426 U.S. 148, 151 n. 3 (1976); Teamsters v. United States, 431 U.S. 324, 374 n. 61 (1977).

on whether the jurisdictional rule of United States v. Salerno, supra, should be extended to prisoners who received "regular adult sentences" with parole eligibility set by 18 U.S.C. §4203 (1970).[2] See 573 F.2d at 152-53. (Pet.App. 6a-7a.) This, of course, is quite different from the present focus of the case on the legality of the parole guidelines.

One consequence of the change in the government's theories is that there is an inadequate record to assess the arguments raised by the government.[3] Thus, even if the issues raised by the government are construed as "fairly comprised" within the question presented in the petition for writ of certiorari, the change in the government's position makes it appropriate for the Court to consider dismissing the writ as having been improvidently granted. Bankers Trust Company v. Mallis, 435 U.S. 381 (1978). Such a disposition would be especially appropriate when the questions addressed by the government will ultimately be decided on a full record by the district court on remand in Geraghty, supra.

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2. The prisoner in Salerno had been sentenced under 18 U.S.C. §4208(a)(2) (1970). 538 F.2d at 1006.

3. The government seeks to overcome the inadequate record by referring the Court to secondary sources. (Pet.Br. 54 & n. 46). These materials have not been tested by an adversary fact finding process and, as shown by the record in Geraghty, supra, are seriously in error. See infra, at 28-34.

II. THE COURT OF APPEALS CORRECTLY ANSWERED THE NARROW QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI

The narrow question presented in the petition for writ of certiorari relates to the scope of jurisdiction vested in the sentencing court by 28 U.S.C. §2255. (Pet. for Writ of Cert. 2.) The government would have the Court answer this question by viewing the decision of the Court of Appeals as a response to the failure of the parole board to have granted parole in a particular case. (Pet.Br. 44-52.) This is an incorrect view of the decision below, which properly construed and applied the jurisdictional limits of 28 U.S.C. §2255.

Section 2255 was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement. See United States v. Hayman, 342 U.S. 205 (1952). The statute vests the sentencing court with the power "to vacate, set aside, or correct" a sentence on the grounds which could previously have been raised in a habeas corpus proceeding.[4] In addition, Section 2255 vests the sentencing court with the power "to vacate set aside, or correct" a sentence which "is otherwise subject to collateral attack."[5]

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4. Section 2255 was intended to be fully coextensive with the remedy formerly provided by habeas corpus. Hayman, supra, 342 U.S. at 219.

5. Section 2255 is reproduced in petitioner's brief at 3.

At the time of the adoption of Section 2255, a conviction was "subject to collateral attack" through a petition for a writ of coram nobis. United States v. Mayer, 235 U.S. 55 (1914). This writ was

> available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by an attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or dies before verdict or interlocutory judgment -- for, it was said, "error in fact is not the error of the judges, and reversing it is not reversing their own judgment . . . " Id. at 68.

The decision of the Court of Appeals upholding the existence of jurisdiction under 28 U.S.C. §2255 conformed to these standards for coram nobis relief. The crucial error of fact was the district court's belief at the time of sentencing that respondent Addonizio would not be denied parole merely because he had committed a serious offense. (Pet.App. 28a-29a.)[6] Had the district judge been aware of this fact, he would have imposed a three

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6. The question of whether a crucial error of fact had been made in sentencing respondents Whelan and Flaherty is part of the remand order of the Court of Appeals. 573 F.2d at 156 (Pet.App. 19a).

and one-half to four year sentence, rather than the ten year sentence actually imposed. (Pet.App. 28a).[7]

The decision of the district court to correct Addonizio's sentence is thus consistent with the essence of coram nobis relief, and was within the powers vested in the court by 28 U.S.C. §2255 to correct a sentence "which is otherwise subject to collateral attack." This is in accord with United States v. Tucker, 404 U.S. 443 (1972), where the Court held that Section 2255 provided the appropriate remedy for reconsideration of a sentence "founded at least in part upon misinformation of constitutional magnitude." Id. at 447.

The government would apparently exclude coram nobis relief from Section 2255 by limiting the "otherwise subject to collateral attack" clause of the statute to situations involving "a complete miscarriage of justice." (Pet.Br. 46.) Although we believe that the revolutionary

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7. This is the sentencing procedure enunciated by Judge Will in United States v. Randle, 405 F.Supp. 5 (N.D.Ill. 1975):

> [In light of the present parole policies], the only way a judge can effectively exercise his sentencing responsibility and judgment is to impose a sentence which, less statutory good time, will result in the period of incarceration he deems appropriate and forget about the Parole Board and the possibility of parole. Id. at 7.

change in parole procedure has worked such a miscarriage of justice, see section III below, this limitation upon Section 2255 relief is only applicable to cases where relief is sought "upon the ground that the sentence was imposed in violation of the . . . laws of the United States." See Davis v. United States, 417 U.S. 333, 346 (1974).

Nor does the crucial error in fact involve a mere disagreement between the sentencing judge and the parole board about when parole should be granted. (Pet. Br. 48-50.) As the opinion of the district court makes clear (Pet.App. 29a), the crucial error of fact was the belief that parole would not be denied merely because Addonizio had committed a serious offense.

The government's reliance upon United States v. Murray, 275 U.S. 347 (1928) and Affronti v. United States 350 U.S. 79 (1955) (Pet.Br. 44-45) is misplaced. In neither case did the Court consider whether 28 U.S.C. §2255 allowed coram nobis relief. In Murray, the Court construed the then newly enacted probation statute, 43 Stat. 1259 (1925), and held that the act did not allow a district judge to transform a sentence of imprisonment into a term of probation once execution of the sentence had commenced. 275 U.S. at 359. The probation statute was altered in connection with the revision and codification of Title 18 in 1948, 62 Stat. 842 (1948), and was construed in Affronti as not allowing a district court to exercise its "probation power . . . after the beginning of

any term of a sentence." 350 U.S. at 82. These statutory interpretations of the probation statutes have no bearing upon the scope of coram nobis relief under 28 U.S.C. §2255.

The difference between modifying a sentence because of a disagreement with a parole decision and correcting a sentence because of a crucial error of fact explains the conflicting decision of the First Circuit in United States v. McBride, 560 F.2d 7 (lst Cir. 1977). The question decided in that case was whether Section 2255 relief would be appropriate because of "the sentencing court's failure to predict what the parole authorities would do." Id. at ll. The same approach was the basis for decision in Andrino v. United States, 550 F.2d 519 (9th Cir. 1977) and Wright v. United States, 557 F.2d 741 (6th Cir . 1977).[8]

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8. The conflicting decisions in the Second and Fourth Circuits are based on a misunderstanding of the radical change in parole policy which took place in 1973. See Dioguardi v. United States, 587 F.2d 572, 575 (2d Cir. 1978)(new parole policy "merely clarified the exercise of [the Board's]] administrative discreation).; Farmer v. United States Parole Commission, 588 F.2d 54, 56 (4th Cir. 1978)(new parole policy is consistent "with both the letter and spirit of the law"). While we believe that the question of whether there was a radical change in parole policy in 1973 is not before the Court in this case, we show in Part III below that there was in fact a radical revision of policy.

In our view, coram nobis relief under 28 U.S.C. §2255 is appropriate whenever sentence was imposed without a full understanding of the revolutionary change in parole policies adopted in 1973.[9] Any other rule would enhance the "national disgrace"[10] of unwarranted sentence disparity. Prisoners sentenced by a judge who understands present parole policy would serve the amount of time in prison intended by the judge, while prisoners sentenced without a full understanding of parole policy will serve far more time in prison than that intended by the sentencing judge.

The burden that this rule would place on district judges will be minimal -- first, because the number of prisoners sentenced without a full understanding of the guidelines is steadily decreasing, and second, because the

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9. We therefore disagree with the view of the Eighth Circuit, United States v. Lacy, 586 F.2d 1258 (8th Cir. 1978)(in banc), that relief depends upon whether the prisoner received "meaningful parole consideration" id. at 1262, and is limited to prisoners who were sentenced under 18 U.S.C. §4208(a)(2) (1970) prior to November 19, 1973, when the new policy was adopted. Id. As recent congressional testimony shows, see infra, at 24 - 25, district judges continue to misunderstand the Board's parole release policies.

10. 124 Cong.Rec. S. 13 (daily ed., Jan. 17, 1978) (remarks of Senator Kennedy).

sentencing judge need not hold a plenary hearing to determine if the prisoner received "meaningful parole consideration." The district judge need only reduce sentenced imposed without a full understanding of the post-1973 parole policies in order to reflect the amount of incarceration intended. This is precisely the rule adopted by the Third Circuit in United States v. Salerno, supra, and it is the rule correctly applied by the Court of Appeals in this case.[11]

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE 1973 RADICAL REVISION IN PAROLE POLICY WAS A CRUCIAL ERROR IN IMPOSITION OF SENTENCE

The core of the government's argument in this Court is that the failure of the District Court to have anticipated the radical change in parole policy adopted in

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11. We do not suggest that any minor change in the parole guidelines would justify resentencing. First, it is the revolutionary change in policy, implemented by the guidelines, which is the crucial error justifying resentencing. Second, assuming that the guidelines are lawful — the question at issue in Geraghty, supra -- a change in the "customary length of imprisonment" of the guidelines would not be a crucial error justifying resentencing. Instead, it could be redressed by a habeas corpus petition, under 28 U.S.C. §2241, challenging the execution of the sentence on the ground that the increase in the "customary length of imprisonment" constituted an ex post facto law.

1973 -- after respondents were sentenced -- was not a crucial error in the imposition of sentence. (Pet.Br. 50-61.) While we believe that this question is not properly before the Court, and should not be decided on the record of this case, our primary purpose in filing this brief amicus curiae is to present the Court with our views, developed in Geraghty, supra, about the revolutionary parole policy adopted in 1973. We therefore discuss below federal parole law and its impact on sentencing practices prior to 1973, and the radical revision in parole release policy in 1973.[12]

A. Federal Parole Law and Its Impact Upon Sentencing Practices Prior to 1973

Parole is the product of prison reformers of the late nineteenth century who believed that "reformation is the primary object to be aimed at in the administration of penal justice."[13] The first modern parole statute, enact-

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12. The questions of whether this change in policy was lawful, or was ratified by Congress in the PCRA, are not at issue in this case. Those are the questions at issue in Geraghty, supra.

13. Wines, Prison Reform 13 (1910), quoted in LaRoe, Parole With Honor 55 (1939). See Lindsey, Historical Sketch of the Indeterminate Sentence and Parole System, 16 J.Crim.L. & Crim. 9, 10-18 (1939); Goldfarb & Singer, After Conviction, 261 - 62 (1973); Carter, McGee & Nelson, Correction in America, 200 - 03 (1976).

ed for use at the Elmira reformatory in New York in 1877,[14] viewed parole "as the culmination of a course of varied institutional training programs, whereby the inmate's capacity and willingness to reform could be tested by serving a part of the sentence in the community on parole."[15] In pertinent part, N.Y. Laws 1877, ch. 424 provided that a prisoner could be released on parole:

> [W]hen it appears to said managers [of the reformatory] that there is a strong and reasonable probability that any prisoner will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society . . . (emphasis supplied)

Parole was incorporated into federal law in 1910. 36 Stat. 819 (1910). As the legislative history of the Act reveals, parole had at that time "come to be regarded as humane, in the interests of sound policy, and highly

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14. "The year 1876 marked the beginning of parole in America, inasmuch as, for the first time in this country, parole was used at Elmira in a manner comparable to present day parole administration." 4 Attorney General's Survey of Release Procedure 19 (1939).

15. Reed, Parole vs. The Determinate Sentence in the Administration of Criminal Justice, 1975 Proceedings of the Congress of Correction of the American Correctional Association 259, 263.

beneficial to the welfare of society." H.Rep. 1341, 61st Cong. 2d Sess., 4 (1910). To provide "an opportunity to relieve the prisoner whose reform had been effected and who gives promise of future good conduct,"[16] Congress made parole available to every federal prisoner serving a sentence of over one year who had exhibited good institutional adjustment, and who had served one-third of the total sentence imposed.[17] The criteria for release on parole tracked the language of the seminal New York statute of 1877; in pertinent part, the Act of June 25, 1910 provided:

> . . . [I]f it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatable with the welfare of society, then said board may in its discretion authorize the release of such applicant on parole . . . 36 Stat. 819-20. (emphasis supplied)

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16. Hearings on S. 870 and H.R. 23016, before Subcommittee of the House Committee on the Judiciary, 61st Cong., 2d Sess., 27 (1910). (Testimony of Judge W.H. DeLacy).

17. The Committee Hearings, supra, note 16, reveal that the choice of the one-third point for parole eligibility was essentally arbitrary (id. at 9), and that it was thought that a prisoner could not demonstrate rehabilitation "until he had been in for a certain time." Id. at 8.

Three years later, parole was made available to prisoners who had received life sentences, but who had served at least fifteen years in prison. 37 Stat. 650 (1913). The 1930 amendment to the parole statute, 46 Stat. 272 (1930), replaced the original parole board -- which had consisted of the superintendent of prisons and the warden and physician of each prison — with what was intended to be "an independent parole board," to be appointed by the Attorney General. H.Rep. 104, 71st Cong., 2d Sess., 1 (1930).[18] Problems developed, however, with the independence of the parole board,[19] and in 1950 Congress required that members of the board be appointed by the President, and approved by the Senate. 64 Stat. 1085 (1950).

In 1951, parole was extended to prisoners serving sentences in excess of one hundred and eighty days. 65 Stat. 277 (1951). This was viewed as the minimum period needed "before the authorities can determine the degree of rehabilitation that would warrant the parole of a prisoner." S.Rep. 524, 82nd Cong., 1st Sess. 2 (1951).

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18. The 1930 amendments also gave to the Board the power to parole without the approval of the Attorney General. 46 Stat. 272.

19. The Parole Board and the Attorney General were shown to have submitted to pressure to release former members of the "Capone gang" after they had served their minimum sentences. See Goldfarb & Singer, After Conviction 170 (1973).

Prior to 1958, a prisoner was required to serve one third of his or her sentence before becoming eligible for parole. 18 U.S.C. §4202 (1950). In 1958, Congress brought indeterminate sentencing to federal law, and vested district judges with the power to authorize parole eligibility at any time, from the first day of imprisonment (18 U.S.C. §4208(a)(2) (1958), or at any time up to one third of the total. 18 U.S.C. §4208(a)(1) (1958). This statute "was intended to give district judges a mechanism to adjust the length of a defendant's sentence to his progress in rehabilitation programs and his attitude toward a return to society." United States v. Salerno, supra, 538 F.2d at 1008.[20]

There were no other changes in federal parole law when the Board of Parole adopted its explicit parole release criteria, discussed below, in 1973. The majority of prisoners received "regular adult sentences," and

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20. The government offers a different view of the intent of the statute. (Pet.Br. 57-58). This question may have been presented in Bonnano v. United States, No. 77--1665, but certiorari was dismissed in that case under Rule 60 on February 1, 1979. Thus, there is no occasion for the Court to consider the dispute as to the Congressional intent underlying 18 U.S.C. §4208(a)(2) (1970).

became eligible for parole after having served one third of their total sentence,[21] and the criteria for granting parole were virtually unchanged from the seminal New York statute of 1877. Thus, in 1973, 18 U.S.C. §4203(a) provided as follows:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole. (emphasis supplied).

Parole was thought to be dependent upon "the conduct of penitentiary convicts during their incarceration." United States v. Murray, 275 U.S. 347, 357 (1928). As aptly summarized by the Court in Morrissey v. Brewer, 408 U.S. 471 (1972):

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21. Of the 11,071 persons sentenced to imprisonment in 1970, 6,688, or 60%, received "regular adult sentences," i.e., sentences where parole eligibility came at the one-third point of sentence under 18 U.S.C. §4203 (1970). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts 1970, 2 (1972). The percentage rises to 69% when Youth Correction Act and Federal Juvenile Delinquency Act prisoners (totaling 1447) are excluded. Id.

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo.L.J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Under some systems, parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society. (footnote omitted) Id. at 477-78.

This view of parole and the general use of "regular adult sentences" where a prisoner would become eligible for parole after serving one-third of the total sentence, gave rise to the "historical assumption that the Board will give meaningful consideration to a defendant with a good institutional record at the expiration of one-third of his sentence."[22] District judges would ordinarily impose

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22. Garcia v. United States Board of Parole, 409 F.Supp. 1230, 1239 (N.D. Ill. 1976), rev'd on other grounds, 557 F.2d 100 (7th Cir. 1977).

sentence by relying "on the assumption that parole will be accorded at the one-third point."[23] As District Judge Lasker recently testified before the Senate Judiciary Committee:

> Many judges, I have to say, Mr. Chairman, habitually impose long or fairly long sentences in the expectation that a grant of parole will result in the actual time served being much less than originally imposed. (Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 95th Cong., lst Sess., pt. 12, at 8969.)

The identical view was expressed by former district judge and then chairman of the Advisory Corrections Council of the Judicial Conference, Harold Tyler:

> You know, and I know, as lawyers, that for years we have read in the papers that an offender, John Doe, has been sentenced to 15 years but we know he is not going to serve 15 years. He is going to serve perhaps 5 years.
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> The public doesn't understand this. We lawyers perhaps do, but I'm not even sure we do all the time. (Hearings on S. 1437, supra, at 8960).

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23. Newman, Preface to Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 812 (1975).

This understanding of the availability of parole to mitigate a harsh sentence is reflected in a survey of district judges[24] and was recently acknowledged by the Senate Judiciary Committee in its report accompanying S. 1437, the proposed revision of the federal criminal code:

> A federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one third of the sentence. (S.Rep. 95-605, 95th Cong., lst Sess., at 1169).

In this Court, the government presents statistics (Pet.Br. 55 n. 47) which purport to show that district judges were mistaken in their understanding of parole. These statistics, however, may be somewhat misleading. Another analysis of the same data, performed by an independent researcher, shows that the probability of parole was greatest when the prisoner had served between 31 to 50 percent of the total sentence imposed. Schmidt, Demystifying Parole 83 (1976). This statistic, in our view, is the one which is relevant to the "historical assumption" that parole would ordinarily be granted after the prisoner served one-third of his or her sentence.

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24. See Project, supra note 23 at 882 n. 361 (88% of judges responding to survey stated that they considered likelihood of parole in determining length of sentence to impose.)

In 1973, however, the parole board adopted rules which made the parole release decision independent of the length of the sentence imposed, see Geraghty, supra, 579 F.2d at 255, and it is now only a coincidence if a prisoner is paroled after serving a third of the sentence imposed. The rules adopted by the parole board for parole release coincide with the length of time in custody before parole eligibility for only half of all persons sentenced to terms of imprisonment,[25] and approximately one quarter of all prisoners are routinely denied parole because they received sentences which are too short to allow them to be paroled under the board's rules.[26] The revolutionary philosophy which is implemented by these rules -- the "parole guidelines" -- is discussed below.

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25. Senate Hearings on S. 1437, supra, at 9000.

26. This statistic was supplied by the Parole Commission in Geraghty, supra.

B. The Revolutionary Change in Parole Practices in 1973

In 1973, the Board of Parole[27] adopted explicit parole release criteria[28] which, as one of the architects of the new policies has admitted, implement a "revolutionary philosophy" in which parole boards "act as sentencing review bodies" to determine "the time convicted offenders should serve in prison."[29] In this Court, the government argues that this "revolutionary philosophy" did not amount to a radical change in policy. (Pet.Br. 50-61.) We disagree.

The keystone of the government's arguments is its assertion that the explicit parole criteria adopted in 1973 are based on an analysis of the board's prior decisions. (Pet.Br. 27-29, 54.) While this assertion has been

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27. The Board of Parole was renamed the Parole Commission in the PCRA in 1976. Throughout this brief, the two names are used interchangeably.

28. Explicit parole release criteria were held to be constitutionally required in Childs v. United States Board of Parole, 371 F.Supp. 1246 (D.D.C. 1973). The parole board acquiesced in that portion of the district court's decree. See 511 F.2d 1270, 1273-74 (D.C. Cir. 1974) (affirming other portions of the decree which had been challenged by the board).

29. Wilkins, Additional Views of Individual Committee Members of the Committee for the Study of Incarceration in Von Hirsch, Doing Justice 178-79 (1976).

repeated so many times that it has achieved an air of truth, it is seriously in error.

The record developed in Geraghty, supra, reveals that the analysis of parole decisionmaking referred to in the numerous secondary sources cited by the government (Pet.Br. 29 nn 16, 17, 54 n. 46) consisted only of a study of decisions made by the Youth Correction Division of the United States Board of Parole in 340 cases from November 1, 1971 to May 30, 1972. Hoffman, Paroling Policy Feedback 7-8 (NCCD Parole Decisionmaking Project Supp. Rep. No. 8, 1973.) This study tested the hypothesis that decisions in Youth Corrections Act cases were based on four factors,[30] id. at 12, and concluded that the most important of those factors was a judgment of the severity of the prisoner's offense. Id. at 16. Only one other factor was found to be contributing to decisionmaking -- a judgment of the likelihood that the offender could successfully complete a parole term. Id. at 12. These two factors were then chosen by the board as the basis for prospective decisionmaking, not only in Youth Corrections Act cases, but in cases dealing with adult prisoners. Hoffman & Gottfredson, Paroling Policy Guidelines: A Matter of Equity 5-9 (NCCD Parole Decisionmaking Project Supp. Rep. No. 9, 1973).

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30. The four factors were offense severity, parole prognosis, institutional program participation, and institutional discipline. Hoffman, supra at 12.

The Youth Act policy provided a poor model for parole decisions in cases dealing with adult offenders.[31] A Youth Corrections Act offender is eligible for release immediately upon imprisonment, 18 U.S.C. §5017(a), and will generally be confined for an indeterminate period of up to six years. 18 U.S.C. §5017(c). Adult offenders, in

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31. In addition, the Youth Act policy was unlawful. The board's primary reliance upon offense severity was contrary to the central purpose of the Youth Corrections Act that "execution of the sentence was to fit the person, not the crime for which he was convicted." Dorszynski v. United States, 418 U.S. 424, 433 (1974). It is for this reason that a number of courts have held the board's post-1973 explicit parole criteria to be unlawful as applied to Youth Corrections Act prisoners. See, e.g., United States ex rel Mayet v. Sigler, 403 F.Supp. 1243 (M.D. Pa. 1975), aff'd without published opinion, 556 F.2d 570 (3d Cir. 1977); Fletcher v. Levi, 425 F.Supp. 918 (D.D.C. 1976); DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978).
The release criteria of the Youth Corrections Act, 18 U.S.C. §5017(a), were amended as part of the PCRA in 1976. The purpose of the amendment was "to provide for parallel release criteria for all eligible prisoners." H.Conf.Rep. 94-238, 94th Cong., 2d Sess., 36 (1976). This amendment has been read as repealing the rehabilitative purpose of Youth Act commitments. See, e.g., DePeralta v. Garrison, supra. If this was the intent of Congress, however, it was not clearly expressed in the legislative history of the PCRA. Cf. Muniz v. Hoffman, 422 U.S. 454, 470 (1975) ("To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable.")

contrast, must generally serve one-third of their sentence before becoming eligible for release on parole,[32] and may receive any sentence up to the maximum allowed by statute.[33]

Had the parole board studied its implicit policies in cases involving adult prisoners, it is obvious that length of sentence and percentage of total sentence served would have been found to be factors in the parole release decision. It is, of course, impossible for the board to have been granting parole to prisoners before they became eligible for parole; nor could the board have been granting parole after the prisoner had fully served the sentence imposed by the district judge. These, however, are the results of applying the Youth Act policy to adult prisoners -- only fifty percent of the defendants sentenced to imprisonment are even eligible for parole after they have served the amount of time in custody "predicted" by the Youth Act policy[34] -- one quarter have satisifed their sentences, and another twenty five percent are not yet eligible for parole.

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32. See note 21 supra.

33. See, e.g., Gore v. United States, 357 U.S. 386 (1958); Townsend v. Burke, 334 U.S. 736 (1948); Blockburger v. United States, 284 U.S. 299 (1932).

34. Senate Hearings on S. 1437, supra, at 9000. (prepared statement of Ronald L. Gainer, Acting Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice)

It is therefore not surprising that when an independent researcher studied the board's decisionmaking policies for cases dealing with adult prisoners, using pre-1973 data, she found that the factors most predictive of actual parole decisionmaking were time served, length of sentence, and custody classification at the time of the parole hearing. Schmidt, Demystifying Parole 62 (1976).

The questions of whether it was perpetuating an unlawful Youth Corrections Act policy, or mistakenly applying that policy to adult offenders, does not appear to have been considered by the board, whose researchers erroneously viewed parole as a "deferred sentencing decision,"[35] rather than as an "established variation on imprisonment . . . to help individuals reintegrate into society as constructive individuals as soon as they are able." Morrissey v. Brewer, 408 U.S. 471, 477 (1972).[36]

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35. Hoffman & Gottfredson, Paroling Policy Guidelines: A Matter of Equity 3 (NCCD Parole Decisionmaking Project Supp.Rep. No. 9, 1973).

36. The failure of the federal Board of Parole to have considered the change in policy which resulted from applying the Youth Act policy to adult prisoners stands in vivid contrast to the reaction of the North Carolina Parole Commission when researchers sought to adopt the federal policy model to North Carolina: "In discussing the federal guideline study, the [North Carolina Parole] Commissioners commented that, unlike the United States Parole

(Continued, p. 32)

This revolutionary philosophy of parole as a deferred sentencing decision was implemented in part through the board's "guidelines for decisionmaking," 28 C.F.R. §2.20. The facts surrounding the genesis and application of the guidelines have yet to be reliably determined, see Geraghty, supra, and we agree with the government (Pet.Br. 59) that the guidelines per se are not at issue in this case. All that may be involved in this case is the radical change in policy adopted by the board in 1973 when it sought to apply its Youth Act policies to adult prisoners.

Perhaps the most salient aspect of the board's post-1973 policies is the complete rejection of factors relevant to the "conduct of penitentiary convicts during their incarceration." United States v. Murray, supra, 275 U.S. at 357.[37] The focus of post-1973 parole decision-

Commission, they were not strongly influenced by the seriousness of the offense. They believed that the judge considered this factor in sentencing, and that it was not their responsibility, in effect, to resentence the inmate. In addition, they explained that because inmates must serve one-quarter of their sentence, this mandatory term represented the deterrent and retributive aspects of the sentence." Gottfredson, Cosgrove, Wilkins, Wallerstein & Raugh, Classification for Parole Decision Policy 38 (1978).

37. It has been suggested that this emphasis is contrary to the "release will not jeopardize the public welfare" standard of 18 U.S.C. §4206(a) (1976). O'Donnell, Churgin, & Curtin, Toward a Just and Effective Sentencing System, 29 n. 30 (1977).

making is on assessing the severity of a prisoner's offense, and determining if, irrespective of the actual sentence imposed, the prisoner has served enough time in prison.

The government offers several arguments to support its claim that adoption of the Youth Act policies for adult prisoners in 1973 "did not add new criteria to the parole decision making process." (Pet.Br. 58.) These arguments are equally without merit.

First, the government asserts that in enacting the 1976 Parole Commission and Reorganization Act, Congress indicated its view that the parole board had not changed its policy in 1973 when it adopted explicit parole criteria. (Pet.Br. 58-59.) For the reasons set out in Geraghty, supra, 579 F.2d at 255-59, we disagree with this view of the legislative history of the PCRA.[38] But even if the legislative history of the 1976 Act is read in the manner claimed by the government, this would be of no real consequence in this case. See Teamsters v. United States, 431 U.S. 324, 354 n. 39 (1977).

Second, the government relies on a number of secondary sources (Pet.Br. 27-29, 54), all of which repeat the error that the policy adopted in 1973 was based on a study of actual decisionmaking, but none of which

38. This case, of course, does not present the question of whether the board's 1973 parole policies were ratified by Congress in the 1976 PCRA.

recognize that the study was limited to decisionmaking in Youth Corrections Act cases. Thus, the "knowledge" referred to in Hoffman, Sigler & Wilkins, Making Paroling Policy Explicit, 21 Crime & Delinquency 34,. 37 (1975) that "a parole board's decisions could be predicted accurately by knowledge of its rating of three factors" refers only to the findings of the Youth Corrections Act study. The same misapprehension of what was actually studied is apparent in Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 823 n. 61 (1974), Singer, In Favor of "Presumptive Sentences" Set By a Sentencing Commission, 24 Crime & Delinquency 401, 417 (1978), and in the other secondary sources cited by the government.

Finally, the government relies on statements made by the parole board prior to 1973 that it would consider offense severity in parole decisions. (Pet. Br. 52-53.) The mere consideration of offense severity is quite different from the primary reliance upon severity in the post-1973 policy, and as shown above, it cannot seriously be argued that there was not a change in policy in 1973.

There is absolutely no factual basis for the government's claim that the new parole policy adopted in 1973 is "essentially a codification of the factors that the Commission was apparently considering all along." (Pet.Br. 60.) On the contrary, the policies adopted in 1973 require that "individuals will serve more time [in prison

before being paroled] than they have in the past." Schmidt, Demystifying Parole, supra, 50.

CONCLUSION

We join with respondents in their prayer that the judgment below be affirmed.

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